New York Judiciary Law (29 McKinney's Consolidated Laws of New York Annotated):

SEC. 475. *Attorney's lien in action, special or other proceeding.*

From the commencement of an action, special or other proceeding in any court or before any state, municipal or federal department, except a department of labor, or the service of an answer containing counterclaim, the attorney who appears for a party has a lien upon his client's cause of action, claim or counterclaim, which attaches to a verdict, report, determination, decision, judgment or final order in his client's favor, and the proceeds thereof in whatever hands they may come; and the lien cannot be affected by any settlement between the parties before or after judgment, final order or determination. The court upon the petition of the client or attorney may determine and enforce the lien.

New York City Administrative Code (2 New York City Charter and Code):

SEC. B15–37.0. *Vesting of title; effect of, upon real property contracts.*

* * * * *

b. All persons in possession of such premises at the time of the vesting of title thereto in the city, shall at the option of the city become tenants at will of such city unless within ten days after the vesting of title, they shall elect to vacate and give up their respective holdings. Where a person in possession is entitled to an award in such proceeding, the reasonable value of his use and occupancy of the premises, as

> fixed by agreement, by the court in such proceeding or by any court of competent jurisdiction, during the period between the date of the vesting of title in the city and the date of the actual payment of the award, shall be a lien against such award, subject only to liens of record at the time of the vesting of title in the city. (Subd. b, as amended by L.L. 1948, No. 63, September 13.)

STATEMENT

The taxpayer, Tailored Contour, Inc., is indebted to the United States for withholding taxes for the years 1955 and 1956. The delinquent taxes were assessed in May, August and November of 1955, and the total amount due on these assessments plus interest is $8,436.78. The amount of the fund in question is $6,056. (Appendix, *infra*, pp. 14–15.)

As part of its Washington Square Slum Clearance project, the City of New York, by an order entered August 5, 1955, condemned the fee of the premises leased by the taxayer which included certain trade fixtures belonging to the taxpayer. (Appendix, *infra*, pp. 13–14.) On March 8, 1954, the taxpayer had retained an attorney, Bernard W. Coblentz, to represent it in any condemnation proceedings. The written retainer provided (R. 14–15):

> I, owner of trade fixtures in premises 55 W. 3rd St. New York, N.Y. hereby retain Bernard W. Coblentz and Louis Epstein to appear as attorney for me in any proceedings taken by condemnation or otherwise by the City of New York, to acquire title to said property.

I authorize him to take such steps as he may deem necessary to obtain a proper amount to be paid or awarded for the said property, and I hereby agree to pay, and do hereby assign to said BERNARD W. COBLENTZ for his services in the matter.

Twenty (20%) per cent of the award and interest that may be paid or awarded for the said property. The said attorney's fees, plus disbursements, are to be paid when the award is paid by the city.

A notice of federal tax lien was duly filed on May 23, 1956. On September 25, 1956, a final decree of condemnation awarded the taxpayer $5,750 which together with legal interest amounted to $6,056. (Appendix, *infra*, pp. 14–15.)

New York University, as project sponsor, became vested with the title of the trade fixtures in question after the condemnation order of August 5, 1955. As sponsor it had a claim for the taxpayer's use and occupancy of the premises after the condemnation and this claim was asserted in the Municipal Court of the City of New York. On May 23, 1956 (the same date the tax liens were filed) the University was awarded a judgment against the taxpayer in the amount of $920. Subsequently, on May 28, 1956, notice of this judgment lien was filed with the City Comptroller. The final award in condemnation made on September 25, 1956, was made subject to the University's judgment lien. Because of the dispute of priorities over the damage fund awarded the taxpayer, the City Comptroller retained the damage check due the taxpayer. (Appendix, *infra*, pp. 14 15, 27, 28.)

The present action was initiated on January 28, 1957, in the New York Supreme Court, Special Term, by Coblentz who moved for an order that his claim for an attorney's lien in the amount of $1,211.20 be given priority over both the liens of the Government for unpaid taxes and the judgment lien noticed by New York University as project sponsor. (Appendix, *infra*, p. 15.) Coblentz alleged that his attorney's lien should be awarded first priority, but that the federal tax lien should be preferred to the judgment lien of New York University. (R. 10–13.) The University, by affidavit, admitted the attorney should have first priority, but alleged its lien was superior to that of the United States. (R. 18–20.) The Government joined in the proceeding and requested that its lien be granted first priority to the fund. (Appendix, *infra*, p 16.)

The Special Term of the New York Supreme Court awarded priorities first to New York University, second to attorney Coblentz, and last to the Government. On the Government's appeal to the Appellate Division of the Supreme Court, this decision was affirmed, *per curiam*, and certified to the Court of Appeals. (Appendix, *infra*, p. 14.)

With Judge Fuld dissenting (Appendix, *infra*, pp. 28–31), the Court of Appeals also affirmed the priorities awarded below. The majority held that New York University, as project sponsor, was entitled to first priority since the applicable statute (New York City Administrative Code, Sec. B15–37.0) granted the city as condemnor a reasonable rental allowance for the time elapsed between the condemnation and the

award, and since the final award was made subject to the payment of the University's judgment for use and occupancy. The court also found that the attorney's lien was entitled to priority over the tax lien on the theory that the attorney had purchased a 20 percent interest in the taxpayer's cause of action when the retainer agreement was signed. Accordingly, it concluded that attorney Coblentz was a "purchaser" within the meaning of Section 6323 of the Internal Revenue Code of 1954 which provides that federal tax liens "shall not be valid as against any * * * purchaser * * * until notice thereof has been filed * * *." (Appendix, *infra*, pp. 13–28.)

REASONS FOR GRANTING THE WRIT

I. PRIORITY WITH RESPECT TO THE ATTORNEY'S FEE

In this respect the decision of the New York Court of Appeals is in direct conflict with that of the Court of Appeals for the Second Circuit in *Goldstein* v. *United States*, 256 F. 2d 581, affirming *per curiam* *United States* v. *Pay-O-Matic Corp.*, 162 F. Supp. 154 (S.D.N.Y.), certiorari denied, 358 U.S. 830, motion for leave to file petition for rehearing out of time denied, 359 U.S. 985. That case arose out of the same condemnation proceeding and also involved an attorney's lien under New York law and a contingent-fee contract similar to that here involved. The court below in this case found a distinction in that here the proceedings were in the state courts, which, it was thought, justified the application of state law. (Appendix, *infra*, p. 26.) But in the field of assessing and collecting federal taxes it is well estab-

lished that federal law controls. *United States* v. *Security Trust & Savings Bank*, 340 U.S. 47; *United States* v. *Acri*, 348 U.S. 211. The situation is to be distinguished from the question as to what rights or liabilities are created under state law upon which the federal tax law is to be applied. See and compare *Commissioner* v. *Stern*, 357 U.S. 39; *United States* v. *Bess*, 357 U.S. 51. The only question is the priority of various claims in a fund admittedly subject to all of them. This question certainly should be decided in the same way whether the proceeding occurs in a state or federal court.[1]

In resolving the conflict between this case and *Goldstein*, we believe the Court should accept the position taken in *Goldstein*, which is in accord with the precedents established in a series of recent cases. Under Sections 6321 and 6322 of the Internal Revenue Code of 1954, *supra*, pp. 2–3, the lien for federal taxes attached to all the taxpayer's property and rights upon the assessment of the taxes in 1955. At that time the right of his attorney to a fee was contingent upon further action and indefinite in amount. Therefore, regardless of state law, it was inchoate and not entitled to priority over the federal lien. *United States* v. *Waddill Co.*, 323 U.S. 353 (landlord's lien); *United States* v. *White Bear Brewing Co.*, 350 U.S. 1010 (mechanic's lien); *United*

[1] The New York court also attempts to distinguish this case from *Goldstein* on the basis that all of the services of the attorney had been rendered before the Government's notice was filed. (Appendix, *infra*, p. 27.) Even if this factor were material, the record does not support the statement and the decisions below were not based upon such an assumption. (R. 5–7, 23, 32–33.)

States v. *Ball Construction Co.*, 355 U.S. 587 (contractual lien); *United States* v. *Liverpool & London Insurance Co.*, 348 U.S. 215 (garnishment lien).

The fact that the notice of the lien was not filed in 1955 gave the attorney no additional rights, since the notice was duly filed on May 23, 1956 (Appendix, *infra*, p. 15). Thus it was recorded prior to the time that the petitioner's lien became non-contingent and certain in amount on the date of the final decree in the condemnation proceeding, September 25, 1956. In any event, under Section 6323 of the Internal Revenue Code of 1954, failure to record the lien could help the attorney only if he were considered a "purchaser" of the property or right which was subject to the lien. In *United States* v. *Scovil*, 348 U.S. 218, 221, the Court disposed of a similar claim that under state law (there South Carolina) a lienor had purchased an interest by saying "A purchaser within the meaning of § 3672 [the comparable provision of the 1939 Code] usually means one who acquires title for a valuable consideration in the manner of vendor and vendee." Obviously the taxpayer and his attorney bore no resemblance to the ordinary vendor and vendee.

We are not unaware that the Court has in recent years been asked to review a considerable number of cases involving the priority of federal tax claims. The Court, we believe, has clearly established the general principles governing the disposition of property which is the subject of conflicting claims, one of which is a federal tax claim. Nevertheless, in cases like the present where a clear conflict has arisen in the lower courts on a particular phase of the problem, and

where the issue is of substantial importance, we believe that resolution by this Court is warranted.

II. PRIORITY WITH RESPECT TO RENTALS

The New York court also held that the rentals due New York University were entitled to priority solely on the ground that under applicable state law, *supra*, pp. 4–5, the claim for rentals related back to time that title passed before the taxes were assessed. (Appendix, *infra*, pp. 27–28.) While the decision in that aspect does not involve a direct conflict, we submit that review is also necessary because the court fell into the same error of applying state law where federal law must control and that the decision departs in principle from this Court's precedents referred to above. The priority given to federal tax liens cannot be avoided by the device of "relating back" an indefinite or "inchoate" claim which is made certain after the federal lien is perfected. *New York* v. *Maclay*, 288 U.S. 290, 293–4; *United States* v. *Security Trust & Savings Bank*, 340 U.S. 47. New York University is clearly not entitled to a preference in the fund as a judgment creditor under Section 6323, since its judgment lien was not perfected under state law until five days after the federal tax lien was recorded.

CONCLUSION

As to the first issue, there is a direct conflict; as to the second, there is a conflict in principle with the decisions of this Court. Both issues are important to the uniform collection of federal taxes. We believe that the petition for certiorari should be granted.

Respectfully submitted,

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Attorneys.

JULY 1959.

APPENDIX

In Re Washington Square Slum Clearance, Etc.

Cite as 184 N.Y.S. 2d 585

5 N.Y. 2d 300

In re Washington Square Slum Clearance, Borough of Manhattan, City of New York

IN THE MATTER OF THE CITY OF NEW YORK, RESPONDENT, RELATIVE TO ACQUIRING TITLE TO REAL PROPERTY FOR THE WASHINGTON SQUARE SLUM CLEARANCE, BOROUGH OF MANHATTAN. UNITED STATES OF AMERICA, APPELLANT; BERNARD W. COBLENTZ ET AL., RESPONDENTS.

Court of Appeals of New York

March 5, 1959

* * * * *

DYE, *Judge:*

On this appeal the respondent, an attorney, and the appellant Government are contesting the relative priority in payment of the attorney's fee for services rendered and the Government's lien for unpaid withholding taxes. The question posed is whether the attorney, by virtue of the assignment clause in his retainer contract, is a "purchaser" of "property" or "rights to property" within the meaning of section 6323 (formerly § 3672) of title 26 of the United States Code.

As part of its Washington Slum Clearance project, DP No. 125, the City of New York condemned the fee of premises occupied under a leasehold by Tailored

Contour, Inc. (hereinafter Tailored). As compensation for the taking of its trade fixtures, Tailored was awarded $5,750 which, with legal interest, a total of $6,056, the City Comptroller is holding, pending determination of priority in payment.

The petitioner Coblentz, an attorney, instituted this proceeding for an order declaring that his claim for an attorney's lien in the amount of $1,211.20 had priority over a judgment lien noticed by New York University, as project sponsor, for arrears in rent in the sum of $920 and a lien for withholding taxes due the United States Government in the sum of $8,436.78. The Special Term ruled that the liens should be paid in the following order: *First* to the University, *second* to Coblentz and *third* to the Government, and directed the Comptroller to pay the claims in that order to the extent of the funds withheld. Upon appeal, the Appellate Division, First Department, unanimously affirmed and granted the Government permission to appeal to this court, certifying that a question of law is involved which ought to be reviewed.

It is undisputed that:

On March 8, 1954

Tailored retained the respondent Coblentz to appear for and to represent them in the condemnation proceeding and for their services "agree to pay, and do hereby assign to said Bernard W. Coblentz for his services in the matter Twenty (20%) percent of the award and interest that may be paid or awarded for the said property. [Trade fixtures] * * * plus disbursements"; that

On August 5, 1955

Title vested in the City of New York on the entry of the order of condemnation (Administrative Code of City of New York, § B15-36.0);

On September 25, 1956

Final decree of condemnation was signed;

On May 23, 1956

The Bureau of Internal Revenue duly filed withholding tax lien in the sum of $8,436.78 viz.:

Tax Period	Assessment Date	Amount of Assessment
3-31-55	5-57	$1,549.76
6-30-55	8-55	1,317.98
9-30-55	11-55	2,059.21
3-31-56		3,000.00
Delinquent interest		509.83
Total		$8,436.78

On May 23, 1956

New York University, as a sponsor of the project, obtained a judgment in the Municipal Court, City of New York, against Tailored in the sum of $920, being the reasonable value of the use and occupation of the condemned premises (Administrative Code, § B15–37.0, subd. b).

On May 28, 1956

New York University filed a notice of its judgment lien against Tailored with the Comptroller. Because of such filing, the City Comptroller retained the damage check due Tailored.

On January 28, 1957

Coblentz moved at Special Term, pursuant to section 475 of the Judiciary Law, Consol. Laws, c. 30, to have his attorney's lien enforced and paid from the proceeds of the award, claiming that it had attached from the commencement of the condemnation proceedings and that he had a first lien on the proceeds to the amount agreed upon, which could not be defeated by the claims of others whose claims, if any,

attached only to the balance. The Government appeared and cross-moved for an order declaring its tax lien.

[1] In ruling that the Government's lien for taxes was subordinate to both the judgment for arrears in rental and the attorney's lien for services, the Special Term deemed that under State law the petitioner, by virtue of the assignment, had a property interest in the award as "purchaser" within the meaning of section 3672 (as it then was, now § 6323) of title 26 of the United States Code, and that as to him, the Government's position was subordinate because its lien was not valid against a purchaser within the meaning of that section unless notice thereof had been filed as provided (Lien Law, § 240, *National Refining Co.* v. *United States*, 8 Cir., 160 F. 2d 951; *Grossman* v. *City of New York*, 188 Misc. 256; 66 N.Y.S. 2d 363; *Matter of Astoria Boulevard*, 171 Misc. 1018, 13 N.Y.S. 2d 433; Government lien filed May 23, 1956, attorney's lien and assignment dated March 8, 1954). This ruling was in accordance with the long-established principle that an attorney's lien upon his client's recovery is a vested property right created by law and not a priority of payment.

By statute in New York (Judiciary Law, § 475) it is expressly provided:

> § 475. Attorney's lien in action, special or other proceeding.—
>
> *From the commencement of an action*, special or other proceeding in any court or before any state, municipal or federal department, except a department of labor, or the service of an answer containing a counterclaim, *the attorney who appears for a party has a lien upon his client's cause of action*, claim or counterclaim, which attaches to a verdict, report, determination, decision, *judgment* or *final order* in

his client's favor, and *the proceeds thereof* in whatever hands they may come; and the lien cannot *be affected by* any settlement between the parties before or after judgment, final order or determination. The court upon the petition of the client or attorney may determine and enforce the lien. [Emphasis supplied.]

It is to be noted that the statute gives an attorney a lien on the *cause of action* which attaches to the judgment from the *commencement of the action.*

[2, 3] Section 475, in substance, declares the common law. The origin of an attorney's lien, whether as retaining or as charging, is obscure, but in all events, irrespective of type, has been recognized and enforced by the courts from very early times (see Fourth Annual Report of N.Y. Judicial Council, 1938, p. 49; 7 C.J.S. Attorney and Client § 210 et seq.; 5 Am. Jur., Attorneys at Law, § 208 et seq.). The underlying purpose at both common law and now, by statute, is to protect an attorney against the knavery of his client (*Rosentover* v. *Weiss,* 247 App. Div. 137 286 N.Y.S. 752, affirmed 272 N.Y. 557, 4 N.E. 2d 735; *Goodrich* v. *McDonald,* 112 N.Y. 157, 19 N.E. 649) and, being created by statute, does not require the giving of any notice in order to bring it into existence (*Drake* v. *Pierce Butler Radiator Corp.,* 202 Misc. 935, 945, 116 N.Y.S. 2d 712) for it is generally regarded as an equitable assignment to the attorney of the fund procured by his efforts to the extent of the amount of his lien (*Matter of Herlihy,* 274 App. Div. 342, 83 N.Y.S. 2d 707).

[4] When, however, the right depends on contract, as it does here, the terms of the contract must be examined in light of the statute (*Matter of Heinsheimer,* 214 N.Y. 361, 108 N.E. 636).

[5] Under this retainer contract the client, Tailored, agreed to pay "and do hereby assign" to said Coblentz for his services 20% of the award and interest. When that express language is read in light of the statute, the parties must be deemed to have intended to, and in fact did, accomplish an immediate transfer of a percentage interest in Tailored's cause of action against the city for the taking of its trade fixtures and which became effective at, as and of the time of the making and which amounted to a *pro tanto* assignment of the proceeds. In other words, the attorney by virtue of the assignment clause in the contract presently acquired a vested property interest in the award which he had "purchased" for a good and valuable consideration, to wit: his services as rendered and to be rendered in the premises. He had title to "property and rights to property" (a cause of action, as we know, is property) which neither the client nor anyone claiming through or against him could subsequently disturb. By the same token, the measure of the client's "property and rights to property" (the cause of action) from the date of the retainer contract was the balance remaining after transfer to the attorney of his agreed share.

[6] Title to property and right to property are exclusively a matter of State law (*Aetna Cas. & Sur. Co.* v. *United States*, 4 N.Y. 2d 639, 176 N.Y.S. 2d 961; *United States* v. *Bess*, 357 U.S. 51, 78 S. Ct. 1054, 2 L. Ed. 2d 1135; *United States Fidelity & Guaranty Co.* v. *Triborough Bridge Authority*, 297 N.Y. 31, 74 N.E. 2d 226; *Fidelity & Deposit Co. of Maryland* v. *New York City Housing Authority*, 2 Cir., 241 F. 2d 142 [see *Scarsdale Nat. Bank & Trust Co.* v. *United States Fidelity & Guaranty Co.*, 264 N.Y. 159, 163, 164, 190 N.E. 330, 331–332]; *United States Gas Co.* v. *Mel Contracting Corp.*, 11 Misc. 2d 492, 158 N.Y.S.

2d 117; [*American*] *Lumbermen's Mut. Cas. Co. of Illinois* v. *Great Atlantic Const. Corp.*, 11 Misc. 2d 491, 158 N.Y.S. 2d 115; *Vincent* v. *P. R. Matthews Co., D.C.*, 126 F. Supp. 102; *Alabama-Tennessee Natural Gas Co. v. Lehman-Hoge & Scott*, D.C., 122 F. Supp. 314; *Royal Indemnity Co.* v. *United States*, 93 F. Supp. 891, 117 Ct. Cl. 736; *Matter of Cummins Const. Corp.*, D.C., 81 F. Supp. 193; *Herrmann* v. *Rogers*, 358 U.S. 332, 79 S. Ct. 353, 3 L. Ed. 2d 345; *Rogers* v. *Calumet Nat. Bank of Hammond*, 358 U.S. 331, 79 S. Ct. 350, 3 L. Ed. 2d 344).

[7] By Federal statute liens for taxes owing to the United States arise upon receipt by the Collector of the assessment list (U.S. Code, tit. 26, § 6322, formerly § 3671) but they attach only to "property and rights to property" belonging to the taxpayer (§ 6321). To quote a succinct comment by Judge Medina: "In adopting this legislation, the Congress did not create property interests on which a lien might be imposed; there is no suggestion that it authorized the federal courts to do so. On the contrary, it took for granted here, as it normally does in the tax law, the vital existence of state laws creating and maintaining various interests. The statute was fashioned to require the courts to determine for federal purposes whether those state-created interests are 'property' or 'rights to property.' That classification of interests is a federal question; the existence of the interests to be federally classified, however, is solely a question of state law." *Fidelity & Deposit Co. of Maryland* v. *New York City Housing Authority, supra*, 241 F. 2d at page 144.

[8] As a generality, it may be said that the right of the Government to levy and collect taxes uniformly throughout the land may not be defeated by the State court rule or regulation (*United States* v. *Vorreiter*,

355 U.S. 15, 78 S. Ct. 19, 2 L. Ed. 2d 23, reversing 134 Colo. 543, 307 P. 2d 475; *United States* v. *White Bear Brewing Co.*, 350 U.S. 1010, 76 S. Ct. 646, 100 L. Ed. 871, reversing 7 Cir., 227 F. 2d 359; *United States* v. *Colotta*, 350 U.S. 808, 76 S. Ct. 82, 100 L. Ed. 725, reversing 224 Miss. 33, 79 So. 2d 474; *United States* v. *Scovil*, 348 U.S. 218, 75 S. Ct. 244, 99 L. Ed. 271; *United States* v. *City of New Britain, Conn.*, 347 U.S. 81, 74 S. Ct. 367, 98 L. Ed. 520; *United States* v. *Kings County Iron Works*, 2 Cir., 224 F. 2d 232; *Aquilino* v. *United States*, 3 N.Y. 2d 511, 169 N.Y.S. 2d 9).

A Government tax lien, however, is not always paramount. By Federal statute, it "shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the Secretary" (U.S. Code, tit. 26, § 6323, subds. [a], [b], formerly § 3672).

The courts below have ruled Coblentz to be a "purchaser" within the meaning of that section as indeed he was by State law, and that, accordingly, the only "property" or "rights to property" belonging to the taxpayer was the balance of the proceeds remaining after the attorney's retainer assignment had been satisfied in full. The client's interest thus amounted to no more than 80% of the proceeds remaining after satisfaction of the judgment held by New York University since the award was made subject to its judgment for arrears in rental.

The Government seeks reversal of the judgment appealed from on two grounds: lack of jurisdiction in the State court to determine the rights of the United States in the proceeds of the award, and that if the State courts have jurisdiction, its determination was wrong.

The challenge to jurisdiction is on the ground of sovereign immunity which the Government asserts has never been waived in a matter of this sort and has not been waived here (*Stanley* v. *Schwalby*, 162 U.S. 255, 16 S. Ct. 754, 40 L. Ed. 960) and that it was not made a party to the proceeding or served with process therein and that jurisdiction was not conferred by the voluntary appearance of the United States Attorney since only Congress has the power to so consent (*State of Minnesota* v. *United States*, 305 U.S. 382, 59 S. Ct. 292, 83 L. Ed. 235; *United States* v. *Shaw*, 309 U.S. 495, 60 S. Ct. 659, 84 L. Ed. 888).

[9, 10] In the setting of this case, these contentions must be rejected. This is not a situation in which the Government is cast in the role of a defendant being sued without its consent but, rather, that of a claimant to disputed funds. In intervening for the purpose of presenting its claim, the United States is an actor—voluntarily asserting a claimed right—and is not a defendant. In so acting, the Government suffers no impairment of its sovereignty by prosecuting such a claim in the appropriate forum where the funds are held (*United States* v. *Bank of New York & Trust Co.*, 296 U.S. 463, 56 S.Ct. 343, 80 L.Ed. 331; *Merryweather* v. *United States* 9 Cir., 12 F. 2d 407; cf. *Moscow Fire Ins. Co., of Moscow, Russia* v. *Bank of New York & Trust Co.*, 161 Misc. 903, 294 N.Y.S. 648, affirmed 253 App. Div. 644, 3 N.Y.S. 2d 653, affirmed 280 N.Y. 286, 20 N.E 2d 758, affirmed 309 U.S. 624, 60 S.Ct. 725, 84 L.Ed. 986). Since the enactment of section 316 of title 5 of the United States Code, an official of the Department of Justice, whenever required to attend to the interests of the United States, is authorized to appear in any suit pending in any of the United States courts or of any State court. The jurisdiction thus recognized is not

defeated by failure to expressly follow the procedure laid down in section 2410 of title 28 of the United States Code. Subdivision (d) of that section has reference to the release of a lien against real or personal property so as to permit its sale, and has no reference to the enforcement of an attorney's lien under section 475 of the Judiciary Law. An action brought pursuant to that section need not comply with the procedural directions prescribed in section 2410 of title 28 (*Lavenburg* v. *Universal Sportwear*, D.C., 92 F. Supp. 473; *Meltzer* v. *Ceglia*, 9 Misc. 2d 464, 167 N.Y.S. 2d 69). Thus, it is manifest that the situs of the fund being in New York, its State courts have jurisdiction to determine its distribution.

[11] As we turn to the merits, perhaps it would be well to again mention that in the court below the attorney's retainer contract and its assignment were treated as an immediate transfer of 20 percent of the client's cause of action which brought the attorney and his lien within the exception accorded to purchasers (U.S. Code, tit. 26, § 6323). When the taxpayer signed the retainer agreement, it effectively divested itself of a part of its cause of action; that since the Government's lien for taxes attaches by statute only to "property and rights to property" belonging to the taxpayer (§ 6321), only the unassigned balance was liable for the tax. Thus the pivotal question turns on who holds the "property and rights to property" liable for the tax rather than on priority in payment of conflicting claims.

The appellant Government now says that such ruling is wrong for the reason that Coblentz was not a purchaser by virtue of the assignment clause within the meaning of section 6323; that all Coblentz obtained was a potential or contingent right conditioned on the making of an award—that under Federal tests his

right was inchoate, and he had no more than a "mere caveat of a more perfect lien to come."

The Government relies on the recently decided Federal court case entitled *United States* v. *Pay-O-Matic Corp.*, D.C., 162 F. Supp. 154; *United States* v. *Goldstein*, 2 Cir., 256 F. 2d 581. Pay-O-Matic, just as Tailored, was a lessee in possession of premises and the owner of trade fixtures taken by the City of New York in connection with the same Washington Square Slum Clearance project—by the same order in condemnation dated August 5, 1955. Subsequent to the making of that order, and

On November 18, 1955

Pay-O-Matic, by written agreement retained Goldstein & Sons, as attorneys to represent it in a suit against the city for the taking of its trade fixtures. Among other things, the agreement recited that "it [Pay-O-Matic] agrees to pay and hereby assigns to said attorneys twenty-five (25%) percent of any award and interest that may be made for trade fixtures contained in said property."

On November 22, 1955

Goldstein filed a notice of lien with the City Comptroller for his fee.

On December 6, 1955

The Government filed a lien for withholding taxes for the year 1955.

On June 27, 1956

The Government filed an amended lien for unpaid withholding and unemployment taxes for the same period totaling $11,822.42.

On August 22, 1956

A final decree was entered awarding damages to Pay-O-Matic in the sum of $4,569.28.

Thereafter, the United States commenced suit in the United States District Court, Southern District of New York, for payment of its tax lien and moved for summary judgment in its favor. Goldstein appeared in the action and cross-moved for summary judgment in his favor. In granting the Government's motion, Ryan, *J.*, ruled that while section 475 of the Judiciary Law, and cases cited, gave an attorney a lien for services which arise at the commencement of the suit and attached to the proceeds, he nonetheless applied the general principle expressed in *United States* v. *Waddill, Holland & Flinn*, 323 U.S. 353, 65 S. Ct. 304, 89 L. Ed. 294, that priority in payment of a Government lien for unpaid taxes was "'always a federal question to be determined finally by the federal courts. The state's characterization of its liens, while good for all state purposes, does not necessarily bind this court.' *United States* v. *Acri*, 348 U.S. 211, 213, 75 S. Ct. 239, 241, 99 L. Ed. 264. Whether attorney Goldstein's lien by state tests would be held to be choate, it is clear that under federal tests it is as compared to that of the Government inchoate. It was not established for the amount of the lien was contingent on the outcome of a trial in the state condemnation court to fix the amount of the award to be made to Pay-O-Matic for the property condemned. It was but a 'caveat of a more perfect lien to come' (*United States* v. *Scovil*, 348 U.S. 218, 220, 75 S. Ct. 244, 246, 99 L. Ed. 271) and is therefore subordinate to the federal tax lien; *United States* v. *City of New Britain, Conn.*, 347 U.S. 81, 84, 74 S. Ct. 367, 370, 98 L. Ed. 520". *United States* v. *Pay-O-Matic Corp., supra*, 162 F. Supp. at pages 155–156.

On appeal, the United States Court of Appeals, 2d Circuit, affirmed April 28, 1958 without opinion

(*United States v. Goldstein*, 2 Cir., 256 F. 2d 581) under authority of *United States* v. *R. F. Ball Const. Co.*, 355 U.S. 587, 78 S. Ct. 442, 2 L. Ed. 2d 510 and certiorari was denied October, 1958, 358 U.S. 830, 79 S. Ct. 50, 3 L. Ed. 2d 68.

In *Waddill, supra,* the United States claimed its lien for taxes was entitled to priority in payment over State and municipal claims and arrears in rental against an insolvent taxpayer. In allowing the Government a preference, the court pointed out that the other claimants, *having failed to perfect their lien* prior to the assignment for the benefit of creditors, could not invoke local rules and regulations even though valid for State purposes to defeat the Government. With this there can be no serious quarrel. We followed that general principle in *Aquilino* v. *United States,* 3 N.Y. 2d 511, 169 N.Y.S. 2d 9. There, it also appeared that the Government had duly filed its tax lien *before* the plaintiffs had filed their notice (Lien Law, Consol. Laws, c. 33, § 240, subd. 2). The plaintiffs sought to avoid this consequence by arguing that their lien dated back to the making of the contract for, under State law, funds received by a contractor from the owner are deemed trust funds (Lien Law, § § 36-a, 13, subd. [7]), a contention which had to be rejected for the very good and simple reason that the Government lien attached as soon as it satisfied the State's requirement as to filing first, which it so happened was first in point of time.

The *Ball* case, *supra,* relied on as authority in the Circuit Court, was an interpleader to determine priority of rival claims. There a subcontractor, in order to induce a surety to file a performance bond, assigned to the surety all sums due or to become due under the subcontract as collateral for any liability it might sustain through nonperformance of the

subcontract and for any other liability to the surety not exceeding the penalty of the bond. The United States Supreme Court ruled that such assignment did not constitute the surety a "mortgagee" of those sums within the meaning of subdivision (a) of section 3672 of the Internal Revenue Code of 1939 (as amended in present § 6323) which provides that a Federal tax lien shall not be valid as against any mortgagee until notice thereof has been filed. Here, again, there was lack of timely notice which could not be cured by resort to a State rule or regulation so as to defeat the Government's prior claim in point of time (cf. *United States* v. *Security Trust & Sav. Bank, of San Diego,* 340 U.S. 47, 71 S. Ct. 111 95 L. Ed. 53).

At first glance, Pay-O-Matic would seem to be controlling and require a reversal. An examination of the authorities on which it was based suggests that it was an extension of the well recognized "first in time, first in right" doctrine in the determination of priority in payment of conflicting claims. Here, there is a clear difference in this case and Pay-O-Matic. It is to be noted in the first instance that the cases were instituted in different courts under different law and to enforce different claims. Here, the attorney sued in the State court to enforce his retainer contract (Judiciary Law, § 475). The Federal Government intervened and demanded preference in payment of its lien for taxes. In point of time, the attorney's retainer antedated the condemnation order by over one year, that is, March 8, 1954, to August 5, 1955. The tax assessment was not made until May, 1955 through November, 1955, in point of time, over 14 to 21 months subsequent to the making of the retainer contract and which was the earliest time on which the taxpayer and the attorney

could be said to have had notice that Tailored owed withholding taxes.

The Government's lien for taxes was not filed until May 23, 1956, two years and two months after the attorney's retainer contract and after the attorney had fully performed the services necessary to create the fund. In point of time, then, the Government's claim was last. The tardiness of the Government in filing may not be excused by asserting sovereign paramountcy. To do so would be the reverse of the rule under which recovery had been allowed in *Aquilino* and *Ball, supra*.

[12] By way of summary, it is well established that the laws of the several States, including the common law, as declared by the highest courts of such States, prevail upon and are enforced in the courts of the United States except where the Constitution, Treaties or Statutes of the United States otherwise require (*Erie R. Co.* v. *Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L. Ed. 1188). That case overruled and disapproved the contrary doctrine of *Swift* v. *Tyson*, 16 Pet. 1, 41 U.S. 1, 10 L. Ed. 865. The determination of what constitutes property of a taxpayer on the date of the asserted lien by the Government is a matter of State law (*Aetna and Bess, supra*, and cases cited; *Aquilino, supra*, petition for certiorari granted, 79 S. Ct. 577).

[13] Compensation for private property taken for public use is to be determined by the procedure established for the exercise of the sovereign power of eminent domain, subject only to certain constitutional limitations not here involved (*Dohany* v. *Rogers*, 281 U.S. 362, 50 S. Ct. 299, 74 L. Ed. 904). Under the New York City Administrative Code, title vests in the city on the entry of the condemnation order (§ B15-36.0). By section B15-37.0, the value of the

property taken is reduced by the reasonable value of the use and occupancy from the date the property was condemned until actual payment of the award. Here the University, as sponsor, had a claim for such use and occupancy which was confirmed by a judgment entered and filed the same day the Government lien was filed. Furthermore, as the lower courts have properly ruled, the award was made subject to the payment of that judgment as provided by the Code (*supra*) which together constituted it a first lien on the proceeds of the award. At most, the owner had right and title to the award as made, less the $920 judgment due the University, payment of which, in the first instance, was made subject to the judgment. Of the balance the attorney had acquired, by prior assignment, 20% of the award and interest which took effect upon the commencement of the action. The "property and rights to property" which remained was all that the taxpayer had to which the Government lien for taxes could attach in any event.

The order appealed from should be affirmed, with costs.

FULD, *Judge* (dissenting):

In my view, the lien of the United States for unpaid taxes is superior both to the attorney's lien of the respondent Coblentz and the judgment lien of the respondent New York University.

Although "a new trend" may be portended by *Commissioner of Internal Revenue* v. *Stern*, 357 U.S. 39, 78 S. Ct. 1047, 2 L. Ed. 2d 1126; see American Bar Ass'n, Proceedings of Section of Real Property, Probate & Trust Law, Part II [1958], p. 81, the cases actually decided by the Supreme Court point the conclusion that the Government's tax lien is superior to the lien of an attorney on a condemnation award

where such award was made after a notice of tax lien had been filed against the taxpayer-client. See *United States* v. *R. F. Ball Const. Co.*, 355 U.S. 587, 78 S. Ct. 442, 2 L. Ed. 2d 510; *United States* v. *Scovil*, 348 U.S. 218, 75 S. Ct. 244, 99 L. Ed. 271; see, also, *United States* v. *Pay-O-Matic Corp.*, D.C., 162 F. Supp. 154, affirmed 7 Cir., 256 F. 2d 581, certiorari denied 358 U.S. 830, 79 S. Ct. 50, 3 L. Ed. 2d 68; *Aquilino* v. *United States*, 3 N.Y. 2d 511, 169 N.Y.S. 2d 9, certiorari granted 79 S. Ct. 577.

The respondent Coblentz and his client, Tailored Contour, Inc., entered into a retainer agreement whereby the latter authorized the respondent to act for it in the condemnation proceedings and agreed to pay him, and "do hereby assign" to him, for his services, 20% of "the award and interest that may be paid" for the property to be taken. As is manifest, no provision of the agreement transferred title or possession to any property and, just as clearly, there was no vendor-vendee relationship created between the respondent and his client, as those terms are ordinarily understood. The respondent agreed to represent the client and to perform legal services, the fee to be paid to him, uncertain in amount, being strictly contingent, payable only if and after an award was made. Indeed, the client was free, despite the retainer agreement, to terminate the attorney-client relationship at any time he chose. See *Matter of Weitling*, 266 N.Y. 184, 194 N.E. 401. At best, therefore, the respondent obtained a potential and inchoate interest, for he had the right neither to receive any money nor to proceed against the property involved in the condemnation proceeding unless and until an award was made. See e.g., *United States* v. *Acri*, 348 U.S. 211, 75 S. Ct. 239, 99 L. Ed. 264; *United States* v. *Scovil*, 348 U.S. 218, 75 S. Ct.

244, 99 L. Ed. 271, *supra*. And, beyond all this, there was the possibility that some eventuality might prevent him from ever obtaining even a part of the award.

All of these factors negate any inference that the assignment relied upon constituted a purchase or stamped the respondent a purchaser within the meaning of the Internal Revenue Code. (See *United States* v. *Pay-O-Matic Corp.*, D.C., 162 F. Supp. 154, affirmed *United States* v. *Goldstein*, 2 Cir., 256 F. 2d 581, certiorari denied 358 U.S. 830, 79 S. Ct. 50, 3 L. Ed. 2d 68, *supra*; *United States* v. *R. F. Ball Const. Co.*, 355 U.S. 587, 78 S. Ct. 442, 2 L. Ed. 2d 510, *supra*; *United States* v. *Scovil*, 348 U.S. 218, 221, 75 S. Ct. 244, 99 L. Ed. 271, *supra*; *United States* v. *Hawkins*, 9 Cir., 228 F. 2d 517, 518–519.) The *Pay-O-Matic* case, also involving priority between an attorney's lien on a condemnation award and a federal tax lien, is indistinguishable from the case before us. In reaching its conclusion, that the attorney's lien was subordinate to the lien of the Government, the court wrote (162 F. Supp. 156):

> Whether attorney Goldstein's lien by state tests would be held to be choate, it is clear that under federal tests it is as compared to that of the Government inchoate. It was not established for the amount of the lien was contingent on the outcome of a trial in the state condemnation court to fix the amount of the award to be made to Pay-O-Matic for the property condemned. It was but a "caveat of a more perfect lien to come" (*United States* v. *Scovil*, 348 U.S. 218, 220, 75 S. Ct. 244, 246, 99 L. Ed. 271) and is therefore subordinate to the federal tax lien; *United States* v. *City of New Britain, Conn.*, 347 U.S. 81, 84, 74 S. Ct. 367, 369, 98 L. Ed. 520.

It is likwise my opinion that the judgment lien of New York University is subordinate to the tax lien. The Government filed its notice of tax liens on May 23, 1956, both in the office of the City Register, the place designated by section 240 of this State's Lien Law, and with the City Comptroller. The University obtained its judgment against the taxpayer, Tailored Contour, on the same day, May 23, 1956, but such judgment was neither filed nor docketed, as required, in the office of the Clerk of the County of New York, until June 5. Since the University could not have a lien against the fixtures belonging to the taxpayer until its judgment was docketed (Civil Practice Act, §§ 509, 510), it is clear that the Government's lien for taxes was prior in time. Once the Federal tax lien is properly filed, no subsequently recorded lien or claim may prevail against it. See *United States* v. *Colotta*, 350 U.S. 808, 76 S. Ct. 82, 100 L. Ed. 725; *United States* v. *City of New Britain, Conn.*, 347 U.S. 81, 84, 74 S. Ct. 367, 369, 98 L. Ed. 520.

The order appealed from should be reversed and the Comptroller directed to pay to the United States, in partial satisfaction of its tax liens, the moneys heretofore awarded to Tailored Contour, Inc.

CONWAY, *C.J.*, and DESMOND, FROESSEL, VAN VOORHIS and BURKE, *JJ.*, concur with DYE, *J.*

FULD, *J.*, dissents in a separate opinion.

Order affirmed.

IN THE MATTER OF ACQUIRING TITLE RE: WASHINGTON SQUARE SLUM CLEARANCE, BOROUGH OF MANHATTAN, CITY OF NEW YORK.

UNITED STATES OF AMERICA, APPELLANT; BERNARD W. COBLENTZ, ESQ., & ORS., RESPONDENTS.

BE, IT REMEMBERED, That on the 9th day of April in the year of our Lord one thousand nine hundred and fifty-eight, United States of America, the appellant—in this cause, came here unto the Court of Appeals, by Paul W. Williams, its attorney—, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the First Judicial Department. And Bernard W. Coblentz, Esq., & ors., the respondents in said cause, afterwards appeared in said Court of Appeals by Bernard W. Coblentz, who appeared in person and for the respondent Tailored Contour, Inc., and there also appeared Gerdes, Montgomery & Miller, and Peter Campbell Brown, attorneys for the remaining respondents.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. Nicholas Tsoucalas, of counsel for the appellant, and by Mr. Alfred D. Jahr, of counsel for the respondent Coblentz, and by Mr. Lester Nelson, of counsel for the respondent New York University, brief filed by amicus curiae, no appearance for the remaining respondents, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed, with costs.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be

remitted to the said Supreme Court, there to be proceeded upon according to law.

THEREFORE, it is considered that the said order be affirmed, with costs, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

RAYMOND J. CANNON,
Clerk of the Court of Appeals of the State of New York.

U. S. GOVERNMENT PRINTING OFFICE: 1939